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999 E Street, N.W.
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Re: MUR 5879 – Response of Respondents Democratic Congressional Campaign Committee and Brian L. Wolff, in his official capacity as treasurer

Dear Ms. Duncan:

We write on behalf of the above-referenced Respondents in MUR 5879, in response to the Commission's finding of reason to believe that they violated the Federal Election Campaign Act (FECA), as amended, 2 U.S.C. 431 *et seq.* (2005). We respectfully submit that the Commission should take no further action against Respondents in this matter.

The General Counsel's Factual and Legal Analysis presents the question whether using a few seconds of campaign footage to provide background images in an independent expenditure transforms the entire expenditure into an in-kind contribution, when the advertisement remains an independent expression of the sponsor's own political views.

The answer to this question should be no. Historically, the Commission has shown appropriate caution when considering charges of republication. The available MURs on the subject are few; and none demonstrates an expansive interpretation by the Commission that would serve as a basis for civil penalties here. *See* MUR 2766, General Counsel's Report at 26 n.6 (1988) (noting that Commission had addressed republication only three times in history of Act and had never imposed civil penalties on that ground). Moreover, the law on republication has long distinguished between communications that express the sponsor's own views, and those that are simply tantamount to cash transfers. To adopt a contrary view would unduly burden the speech rights of a large segment of the regulated community, cause future independent expenditures to

consist almost entirely of negative ads, and disrupt long standing interpretations of FECA and the Commission's rules.

I. FACTUAL BACKGROUND

The advertisements in question aired in October and November 2006, after the *Arizona Republic* endorsed Harry Mitchell instead of his Republican rival, J.D. Hayworth, for U.S. Congress.[1] This was the first time in over ten years that Hayworth failed to receive the newspaper's endorsement, and was a critical event in the race. It was accordingly unsurprising that the Mitchell campaign and the Democratic Congressional Campaign Committee (DCCC)—operating with a firewall between them—would independently decide to publicize the endorsement. *See* DCCC Response at 2; Habershaw Aff. ¶ 2-5.

Both advertisements are thirty seconds long. Both focus on the endorsement, and both contain footage of Harry Mitchell. But they are visually and thematically distinct:

Mitchell Ad	DCCC Ad
The ad begins with a positive image of Mitchell on the editorial page of the newspaper, before panning to a grainy black and white image of Hayworth.	The DCCC advertisement opens with a negative, color image of Hayworth on a bright blue background. Mitchell does not yet appear.
A female narrator provides just three explanations for why the newspaper rejected Hayworth. She singles out the paper's criticism of Hayworth's position on immigration.	A male narrator quotes the paper as saying that Hayworth has "changed." Eight separate quotes appear on the screen, describing Hayworth, as among other things, "a bully," "a cartoonish politician," "overbearing," "obnoxious," and "a demagogue." His position on immigration is not mentioned.

[1] From its review of the Complaint and the General Counsel's Factual and Legal Analysis, the DCCC believes that the two enclosed advertisements are the advertisements at issue. *See* Exhibit A.

The narrator returns to a positive Mitchell message, quoting the paper as calling him a "'respected' 'consensus builder'" who "can 'get results.'" There is no explicit party reference.	The ad mentions Mitchell for the first time. The narrator quotes the paper as saying that he is respected by both "community leaders" and "Republicans," and is a "consensus builder."
Mitchell himself addresses the viewer, criticizing politicians who go to Washington and forget about voters back home. Meanwhile, video images of Mitchell appear on the screen, in which he stands with young voters, then seniors, then to camera, then with two young girls, and then with another senior citizen.	The narrator continues to speak, as video footage shows Mitchell standing first with young voters and then with seniors. Mitchell's voice is never heard.

II. DISCUSSION

A. A Finding of Republication Would Ignore Statutory Purpose, Disregard the Commission's Longstanding Approach, and Have Far-Reaching Consequences

A finding of republication against these two ads lacks support from statutory and regulatory history. Throughout its history, the Commission has read the republication rule narrowly, rarely, if ever, using republication as a basis for civil penalties. The basic test for republication that emerges from an examination of Commission action is functional: Does the communication at issue involve the use of an individual's resources to aid a candidate in a manner tantamount to a cash transfer, or does it remain an expression of the sponsor's own views? To abandon this test in favor of a formalistic test, in which the use of a few seconds of footage is treated no differently than placing gross rating points behind a candidate ad, would have far-reaching consequences.

1. The General Counsel's recommendation ignores the basic statutory purpose of the republication provision

Under FECA, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure." 2 U.S.C. § 441a(a)(7)(B)(iii).

Congress added this "republication" provision in 1976 when it redefined the term "contribution," following the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). As the Conference Report accompanying the bill made clear, the purpose of the new provisions defining contribution was to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate *in a manner indistinguishable in substance from the direct payment of cash to a candidate*." H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976) (emphasis added).

2. The Commission's longstanding interpretation of 2 U.S.C. § 441a(a)(7)(B)(ii) effectively distinguishes republication that is "indistinguishable in substance from the direct payment of cash" from the incorporation of parts into an independent communication

For several decades, consistent with the general approach Congress took when passing the 1976 amendments, the Commission approached questions of republication cautiously. It effectively distinguished between unadulterated republication, and incorporation of small parts into a freshly developed message.

Following the 1976 amendments to FECA, the Commission promulgated 11 C.F.R. § 109.1(d), the precursor to the current republication rule. In the E&J accompanying the 1976 regulations, the Commission recognized that Congress's general statutory purpose was to treat as contributions "arrangements or conduct that remove the independent nature of the expenditures." *See* Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971, House Doc. No. 95-1, at 55 (Jan. 12, 1977). Nothing in the E&J suggested an intent to capture a sponsor's genuine communication of its own views. To the contrary, the rule paralleled the standard for corporate and union membership communications, which distinguished republication from the "communication[] of the views of the corporation or labor organization ...." *See* 11 C.F.R. § 114.3(c)(1)(ii).

The MURs support this approach. An evenly-divided Commission resisted an overly expansive interpretation of the republication rule in 1987 when it closed a matter involving the American Medical Association without further investigation, even though the candidate acknowledged the possibility that some of his materials were republished. *See* MUR 2272. A commissioner noted that "the regulations . . . do not 'prohibit' gaining information or researching ideas from campaign materials for use in entirely new communications. . . . Instead, the regulations properly consider a tangible reproduction of campaign materials to be a contribution because such recognizable, identifiable activity constitutes implied or constructive coordination with the campaign." MUR 2272, Statement of Reasons, Commissioner Thomas J. Josefiak.[2]

[2] In early cases, the Commission also rejected formalistic interpretations of the regulation that would have expanded the republication rule beyond its intended reach. For example, in 1981, the Commission rejected the contention that

In 1988, in a matter involving Auto Dealers and Drivers for Free Trade, the Commission again declined to find wrongdoing despite similarities in at least a few sentences of written material and possibly greater parallels in television advertisements. *See* MUR 2766.[3] The General Counsel's Report suggested that the use of a few sentences could constitute republication, but concluded that "any resemblance between these few sentences does not rise to a level sufficient to indicate republication or redistribution of campaign materials because of differences in wording and phrasing." *Id.* at 26. Moreover, the Report observed that, from its inception until 1988, the Commission had addressed republication in only three matters and did not take action in any of them. Here, too, the Commission declined to pursue the republication charge. *Id.* at 26 n.6.

In contrast, where a membership organization distributed actual candidate position papers, the General Counsel found probable cause to believe the organization "essentially" engaged in "the republication of campaign materials." MUR 2804R, American Israel Public Affairs Committee, General Counsel's Report, at 21 (2000). Even here, however, the Commission declined to take further action on the asserted violation. *Id.*

3. Neither BCRA, the 2003 Rules, nor post-2003 MURs altered this test

Neither the Bipartisan Campaign Reform Act of 2002 (BCRA), nor subsequent Commission action altered the republication test. In BCRA, Congress instructed the Commission to promulgate new regulations on "coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees." Pub. L. 107-155, § 214(c) (March 27, 2002). Congress mandated that the new regulations address four specific aspects of coordinated communications, the first of which was "republication of campaign

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Reader's Digest violated the republication rule when it reprinted portions of Republican and Democratic Campaign materials in a Washington Post advertisement publicizing an upcoming magazine issue devoted to the 1980 elections. *See* MUR 1283; *see also Epstein v. FEC*, 2 Fed. Elec. Camp. Fin. Guide (CCH) 9161 (D.D.C. 1981), *aff'd mem.*, 684 F.2d 1032 (D.C. Cir. 1982). Similarly, in 1985, the Commission held that an opponent's republication of a candidate committee's advertisements was not a contribution. *See* MUR 1980 (Carlson for Congress). Both of these cases saw a common sense conclusion, but not one commanded by the statute itself, and not written into the regulations at the time.

[3] In MUR 2766, the complainants alleged that advertisements run by the Auto PAC were "fully overlapping" with those of a candidate's campaign; the written advertisements used "almost identical language" to make "the same claim about [the candidate's] service in years past in military intelligence." The Auto PAC also "mimic[ked]" and "borrowed and rebroadcast" the campaign's television advertisement. MUR 2766, Amendment to Complaint, at 2 (Nov. 7 1988). In defense, the campaign and the PAC claimed they had not worked together; the PAC asserted it had researched news clips, video tapes of debates, state legislative records and other information from public libraries to create its materials. General Counsel's Report at 24.

materials." *Id.* § 214(c)(1)-(4).[4] Congress did not, however, mandate any particular approach to republication; it required simply that the subject be addressed.

In its rulemaking, the Commission expressly declined to make any substantive change to its longstanding interpretation: "The only changes from the former rule are the replacement of one cross-reference to former 11 CFR 100.23 (repealed by Congress in BCRA), a clarification that a candidate does not receive or accept an in-kind contribution unless there is coordination, and minor grammatical changes." *See Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 441 (Jan. 3, 2003).

In rejecting various exceptions proposed by commenters, the Commission emphasized that it saw no reason to depart from its longstanding interpretation of the republication provision. *See, e.g.*, 68 Fed. Reg. at 442 (rejecting proposal "that republication should not be considered a contribution unless there is coordination," for the Commission could "not discern any instruction from Congress, nor any other basis, that justifies such a departure from the Commission's longstanding interpretation of the underlying republication provision in the Act, now set forth at 2 U.S.C. 441a(a)(7)(B)(iii)").

The Commission's position throughout the rulemaking was consistent with its longstanding approach: to prevent individuals from skirting the contribution limits and providing what amounts to a cash transfer—*e.g.*, by simply buying more time for a candidate's ad, or duplicating a campaign's bumper stickers. The Commission declined to adopt exceptions where they had the potential to swallow the rule. For example, the Commission declined to promulgate a "public domain" exception that would have "cover[ed] republication and distribution of original campaign material that already exists in the public domain, such as presentations made by candidates, biographies, positions on issues or voting records" "because such an exception could 'swallow the rule.'" "[V]irtually all campaign material," the Commission reasoned, "could be considered to be 'in the public domain.'" 68 Fed. Reg. at 442. In effect, a public domain exception would have enabled individuals to shield contributions from statutory limits; the republication rule would no longer have honed in on "arrangements or conduct that remove the independent nature of the expenditure." *See* Explanation and Justification for 1977 Amendments to the Federal Election Campaign Act of 1971, Communication from the Chairman, FEC, House Doc. No. 95-1, at 54 (Jan. 12, 1977).[5]

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[4] Notably, Congress enacted BCRA shortly after the Commission considered a series of 1996 DNC advertisements, which involved "exact facsimiles" of Clinton advertisements—not portions of material incorporated into new, independent communications. *See, e.g.*, Report of the Audit Division on Clinton/Gore '96 Primary Committee, Inc., at 30 (1998).

[5] For similar reasons, the Commission rejected a "fair use" exception. Such an exception would have "permit[ed] the republication of campaign slogans and other limited portions of campaign materials" in accordance with

Yet, the Commission also added to § 109.23(b) an exemption for the use "of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views . . . ." 11 C.F.R. § 109.23(b)(4). While explaining a separate exemption for using an opponent's campaign materials, *see id.*, § 109.23(b)(2), the Commission suggested that the use of a "picture or quote" from a supported campaign's materials might trigger the restriction. 68 Fed. Reg. at 443. This fragment of E&J, however, makes sense only if read narrowly to explain how the exception at § 109.23(b)(2) works, without disturbing the scope of the "brief quote" exception. *First*, the Commission repeatedly insisted that it was not changing the rules. *See id. Second*, to the extent the Commission meant to exclude imagery from the definition of a "brief quote," that distinction cannot pass muster. There is no statutory basis for differentiating an image from other materials, and courts have shown no patience for such logic. *Cf. FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996). Reliance on this two-sentence passage from the E&J would put the Commission in the position—without prior notice and in considerable tension with First Amendment principles—of dictating the content of an ad: permitting the use of some materials (quotes) and not others (images). In short, this portion of the E&J cannot be read as changing longstanding Commission practice.

Only in the last year has the Commission veered from its longstanding functional interpretation of the republication rule. In MUR 5743, the Commission admonished EMILY's List for republication of photographs obtained from Betty Sutton for Congress's publicly available website, even though the photographs were incorporated into a new and unique communication. *But cf.* MUR 5743, Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub. The General Counsel's Report, however, did not fully explore or test the legal standard and ultimately recommended that the Commission take no further action. *See* MUR 5743, First General Counsel's Report at 8. *Cf.* MURs 5672, 5733, Save American Jobs Association (2006) (concluding that publishing a campaign video *in full* on committee's website constituted impermissible republication, but providing little legal analysis and recommending no further action).

4. Abandonment of the Commission's historic distinction, in favor of a formalistic test whereby the use of a single image can trigger contributions, would cause serious practical problems

To abandon the Commission's historic distinction—between the unadulterated republication of campaign materials in whole or part, and the incorporation of a small portion of materials into a

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intellectual property law. 68 Fed. Reg. at 443. In rejecting a "fair use" rule, the Commission was not broadening its longstanding interpretation of republication; it was simply declining to add a new and potentially expansive exception. *See id.*

sponsor's own independent expenditure—would disrupt other regulatory interpretations and would have detrimental consequences for political speech:

First, a formalistic test that asks only whether a party has used even a single campaign image would unduly burden the party's rights to make independent expenditures. As the Commission is well aware, "[t]he independent expression of a political party's views is 'core' First Amendment activity," which cannot be restricted by campaign finance regulation. *Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996). Though expenditures that are *coordinated* with a candidate's campaign can be treated as contributions, *FEC v. Colorado Republican Campaign Comm.*, 533 U.S. 431 (2001), expenditures that are independent in nature may not be restricted. Applying a rigid and formulistic reading of the republication rule—*i.e.*, ignoring whether the use of material is incidental and incorporated into an independent communication—raises constitutional concerns that neither the Commission nor the courts have expressly considered.

Second, such a formalistic test would transform the nature of independent expenditures. It would make them almost entirely negative. Committees seeking to promote a candidate independently—as the DCCC did with Harry Mitchell—have few options in seeking current, positive images of the candidate, especially when the race involved is a lower-profile House race. Yet under 11 C.F.R. § 109.23(b)(2), they have *carte blanche* to use opponent images in a negative ad. To find republication here would send the message that the safest way to spend independently is to go on the attack. This is hardly the sort of outcome intended by a Congress that wanted to curb negative advertising through BCRA, with devices like "stand-by-your-ad" disclaimers and restricting access to the lowest unit charge.

Third, a formalistic test threatens the safe harbor for candidate endorsements contained in the coordination regulations. *See* 11 C.F.R. § 109.21(g) ("A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office is not a coordinated communication with respect to the endorsing Federal candidate unless the public communication promotes, supports, attacks, or opposes the endorsing candidate or another candidate who seeks election to the same office as the endorsing candidate."). Those who seek endorsements from federal candidates frequently turn to their campaigns for photos. Yet under the logic of the Factual and Legal Analysis, any use of a photograph obtained from a candidate's committee on an endorsement flyer would violate the republication rule and would constitute a contribution—even if it falls within the safe-harbor provision of the coordination rule.

B. Under the Longstanding and Proper Interpretation, the DCCC Advertisement Does Not Constitute Republication

Unquestionably, the DCCC and Mitchell ads were similar. They could hardly have been otherwise, with both committees seeking to take advantage of the same newspaper endorsement—a turning point in the final days of the race. Yet it goes too far to say that the DCCC did not express its own political views, but instead did the equivalent of placing more money behind Mitchell's ad.

The two ads were different in critical ways—all underscoring the fact that the DCCC was communicating its own message. Unlike the Mitchell campaign, the DCCC offered a straightforward, dual-track advertisement, with the first 15 seconds exclusively attacking Hayworth, and the last 15 seconds exclusively promoting Mitchell. Moreover, the DCCC shaped its message in ways that diverged from Mitchell's objectives. It chose not to mention Hayworth's anti-immigration position; the Mitchell campaign chose to emphasize it. It chose to highlight Mitchell's appeal to Republican voters; Mitchell avoided any mention of party at all. The DCCC's ad was not the ad that Harry Mitchell's campaign would have run—or indeed did run.

The common footage of Mitchell interacting with students and seniors is the least significant part of either ad. In both cases, it functions solely as visual background, while the intended message is communicated through audio. Moreover, in the DCCC's case, the party could not possibly have conveyed a positive message about Mitchell on television without the images. Practically speaking, the party would have been limited to attacking Hayworth.

The Commission's longstanding approach to republication allows such a use of footage. It distinguishes a sponsor's expression of its own views from the effective transfer of cash to a supported candidate. It effectively recognizes that incorporating a few seconds of candidate footage into an independently developed communication is different in kind, degree, and value from placing gross rating points behind a candidate's ad. It respects the core First Amendment activity of parties, corporations, and unions. It allows room for positive independent expenditure ads. It does no damage to other Commission rules, like those on candidate endorsements.

To move away from this interpretation would cause serious problems. It would place an undue and potentially unconstitutional burden on party First Amendment rights. It would threaten to do the same for corporations and unions that communicate with their members. It would drive independent expenditure advertising into a pit of almost relentless negativity. And it would require fresh and careful guidance to those who seek to benefit from candidate endorsements, and who have no idea that using a picture provided by the endorsing candidate's campaign might be a problem.

Finally, to use this matter not only to adopt a formalistic test for republication, but also as the occasion to seek civil penalties, would be inconsistent with prior Commission matters. Even MURs where the Commission has found genuine republication have ended only in admonishment, or in no further action whatsoever. If the Commission wishes to stake out new ground in the field of republication, it should do so carefully, and deliberately, with proper notice and clear standards.

III. CONCLUSION

For these reasons, we respectfully request the Commission to dismiss MUR 5879 and take no further action.

Very truly yours,

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